(2)

No. 90-693

In The

Supreme Court of the United States

October Term, 1990

CURTIS REED JOHNSON,

Petitioner and Cross-Respondent,

vs.

HOME STATE BANK,

Respondent and Cross-Petitioner.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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A. QUESTION PRESENTED FOR REVIEW

Can a debtor, who previously received a discharge in a Chapter 7 bankruptcy, obtain confirmation of a Chapter 13 plan which reamortizes a lien that survived his Chapter 7 bankruptcy and makes no provisions to cure his default or pay arrearages.

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D. ADDITIONAL STATUTES INVOLVED

11 U.S.C. §101(9) "creditor" means –

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

(B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h), 502(i) of this title; or

(C) entity that has a community claim

E. STATEMENT OF THE CASE

[1]The Respondent (hereinafter "Bank") adopts the Statement of Facts filed by Petitioner (hereinafter "Johnson" or "Debtor"), with the exception of the following additions and modifications. On page 4 of his petition, Johnson correctly states that he and his wife (hereinafter "Johnsons") defaulted on their notes with the Bank, and on March 23, 1984, the Bank filed a foreclosure action against them in Edwards County, Kansas, District Court. Johnson does not mention that on September 7, 1984, approximately one month before the Johnsons filed their joint voluntary Chapter 7 petition, the Johnsons executed a deed to their son, transferring to him all of their ownership in a quarter section of land owned by the Johnsons in Edwards County, Kansas, and secured by the first and second mortgages. This deed was filed with the Edwards County Register of Deeds on September 10, 1984.

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[1] Respondent draws from the facts recited by the Tenth Circuit and District Courts in their opinions. See, *In Re Johnson*, 96 B.R. at 326-28; *In Re Johnson*, 904 F.2d at 564.

Johnson's petition notes that on February 24, 1987, Johnson's wife, son, and daughter-in-law executed quitclaim deeds consolidating ownership of all real property in issue to Johnson. Those quitclaim deeds were filed for record with the Edwards County Register of Deeds on February 26, 1987. Four days later, on March 2, 1987, while foreclosure proceedings were pending and one month before the property was scheduled to be sold by the sheriff, Johnson filed his voluntary Chapter 13 petition in bankruptcy.

On or about June 23, 1987, the Bankruptcy Court held Debtor's plan was "not confirmable for lack of feasibility under present circumstances."

On or about July 6, 1987, Johnson filed his amended Chapter 13 plan. The Bank, again, filed an objection to the amended plan. Under the amended plan, Johnson proposed to pay the Bank the Edwards County District Court judgment in five annual installments of $11,100.00, $35,520.00, $35,520.00, $38,850.00, and $19,425.00, with a final balloon payment of $80,625.92 at the conclusion of the five-year plan. The plan further proposed to make monthly payments in the amount of $291.42 to Mid Kansas Federal Savings & Loan, the only other creditor in Johnson's plan, with a balloon payment of $6,507.00 to that institution at the end of the 60-month plan.

During its five (5) year term, Johnson's amended plan provides no payment to unsecured creditors and provides no cure to any arrearages. During the pendency of the bankruptcies and appeals, Johnson has remained in possession of the property and received farm income and government subsidies.

Johnson's amended plan calls for the borrowing of one hundred sixty-three (163) percent of his estimate of the appraised value of the subject property at the conclusion of the plan.

Johnson was only eligible to file his Chapter 13 bankruptcy because his unsecured debt had been discharged in his prior Chapter 7 bankruptcy.

Johnson neither attempted nor negotiated a reaffirmation of the discharged debt during his Chapter 7 bankruptcy.

Pursuant to his plan, Johnson has made only one payment to the Bank in the amount of $10,000.00 and is delinquent in his payments in the amount of $109,890.00 as of December 1, 1990.

F. SUMMARY OF THE ARGUMENT

There Is No Conflict Among Decisions of The United States Courts of Appeals

The Tenth Circuit Court of Appeals' opinion does not conflict with decisions of other Circuits, District Courts, or Bankruptcy Courts cited in Johnson's petition. All opinions cited by Johnson reviewed Chapter 13 plans that cured arrearages and proposed full payment on the original debt that had been discharged in the Debtor's previous Chapter 7 plan. The Tenth Circuit encountered an issue factually different from those courts cited by the Debtor in his Petition for Writ of Certiorari.

Other Grounds Exist To Support The Tenth Circuit Decision

Even if this Court were to review the issue raised by Johnson, the issues of Debtor's lack of good faith and feasibility of his plan provide other grounds to support the decision below. 11 U.S.C. §101(4) and its legislative history defining "right to payment" provide additional grounds for affirmation of the Tenth Circuit's decision.

The Tenth Circuit's Decision Is Not Contrary To A Decision Of This Court

The Debtor asserts *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. ___, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990) is controlling of the issues raised in his petition. The *Davenport* decision is factually incompatible with the issues that were before the Tenth Circuit. *Davenport* held the terms "debt" and "claim" permitted criminal restitution obligations to be discharged in a Chapter 13 bankruptcy. The present case involves a debtor who discharged his unsecured debt in a Chapter 7 bankruptcy and then filed a Chapter 13 bankruptcy rescheduling the discharged debt without providing any cure to the default or payment of arrearages. The *Davenport* decision is not controlling upon the issues here.

G. REASONS WHY THE WRIT SHOULD BE DENIED

There Is No Conflict Among Decisions of The United States Courts of Appeals

The Tenth Circuit Court of Appeals held that "a debtor's Chapter 13 plan cannot be confirmed where it

improperly schedules a debt previously discharged under Chapter 7. . . . " *In Re Johnson*, 904 F.2d 563, 566 (10th Cir. 1990). Johnson primarily argues his Petition for Writ of Certiorari should be granted because the Tenth Circuit holding conflicts with the decisions of two other Circuit Courts of Appeals[2] and several federal district courts and bankruptcy courts.[3]

Contrary to Johnson's assertions, there is no conflict among the Circuits. Similarly, the Tenth Circuit Court of Appeals' opinion is not in conflict with the decisions of the federal district courts and bankruptcy courts cited by Johnson.

Johnson argues that the Tenth Circuit's decision is exactly the opposite of two other Circuit Courts of Appeals because it "creates a rule of law that deprives people subject to the Tenth Judicial Circuit's jurisdiction of a type of relief in bankruptcy which is expressly available to other people subject to the jurisdiction of the Ninth and Eleventh Judicial Circuits."[4] This is a perceived misstatement, as the Tenth Circuit's decision does not conflict with either *In Re Metz*, 820 F.2d 1495 (9th Cir. 1987) or *In Re Saylors*, 869 F.2d 1434 (11th Cir. 1989).

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[2] See, *In Re Saylors*, 869 F.2d 1434 (11th Cir. 1989); *In Re Metz*, 820 F.2d 1495 (9th Cir. 1987)

[3] See, *Grundy Nat. Bank v. Johnson*, 106 B.R. 95 (W.D.Va. 1989); *In Re Ligon*, 97 B.R. 398 (Bankr. N.D.Ill. 1989); *In Re Smith*, 94 B.R. 216 (Bankr. M.D.Ga. 1988); *In Re Hagberg*, 92 B.R. 809 (Bankr. W.D.Wis. 1988); *In Re Klapp*, 80 B.R. 540 (Bankr. W.D.Okla. 1987); *In Re Lagasse*, 66 B.R. 41 (Bankr. D.Conn. 1986); *In Re Lewis*, 63 B.R. 90 (Bankr. E.D.Pa. 1986)

[4] See Johnson, Petition for Certiorari, P.7

Both the *Metz* and *Saylors* courts held that a Chapter 13 plan may cure arrearages on home mortgages even though the underlying mortgage debt had been discharged in a prior Chapter 7 proceeding. In both the *Metz* and *Saylors* cases, the debtors proposed Chapter 13 plans that cured all arrearages, with reinstatement and full payment of the original debt. The *Metz* and *Saylors* courts also found it significant that the debtor's monthly incomes had increased.

In the present case, Johnson's amended plan does not reinstate any debt previously discharged in his Chapter 7 plan. Johnson's plan does not provide for a cure of any arrearages. His Chapter 13 plan provides no payment to unsecured creditors. Unlike the debtors in *Metz* and *Saylors*, Johnson's monthly income had not increased. In fact, the Bank has received only one $10,000.00 payment from Johnson under his plan, while Johnson has remained in possession of the property and received farm income and government subsidies. As of December 1, 1990, Johnson is $109,890.00 delinquent in his payments under his Chapter 13 plan.

The Tenth Circuit simply did not have the same facts and issues that were before the *Metz* and *Saylors* courts. Thus, there is no conflict among the Circuits.

Not only is there no conflict among the Circuits, but there is no conflict among the federal district courts and bankruptcy courts Johnson cites in his petition.[5] In every court decision cited by Johnson in support of his Petition for Certiorari, the Court reviewed a Chapter 13 plan that

[5] See Johnson, Petition for Certiorari, P.6, n.2

cured arrearages on a previously discharged debt.[6] Since Johnson's plan provides no cure for arrearages, this issue was never before the Tenth Circuit Court of Appeals and is, therefore, not a proper question presented for review pursuant to Rule 10 of the Rules of the Supreme Court.

Because the Tenth Circuit encountered a matter factually different from those courts cited by the Debtor in his Petition for Writ of Certiorari, there is no conflict and, thus, individuals subject to the Tenth Judicial Circuit's jurisdiction are not denied relief in bankruptcy which is available to individuals in other circuits.

Other Grounds Exist To Support The Tenth Circuit Decision

It is also interesting to note that two cases cited by Johnson as conflicting with the Tenth Circuit Court of Appeals, *In Re Hagberg*, 92 B.R. 809 (Bankr. W.D.Wis. 1988) and *In Re Smith*, 94 B.R. 216 (Bankr. M.D.Ga. 1988), did not confirm Chapter 13 plans that were proposing cures of arrearages because of bad faith and equity reasons. Not one of the cases cited by Johnson dealt with the fact situation that was before the Tenth Circuit and which is being attempted to be brought before this Court. In fact, the *Metz* and *Saylors* courts not only addressed Chapter 13 plans curing arrearages but also stated that the good faith of the debtor would be considered before allowing the curing of arrearages on a debt previously discharged in a prior bankruptcy. While not reaching the good faith issue in the present case because of its ruling

[6] See n.3, supra

on another issue, the Tenth Circuit specifically indicated the Bank presented compelling arguments to both good faith and feasibility issues. *In Re Johnson*, 904 F.2d 563, 566 (10th Cir. 1990). Thus, even if this Court were to review the issue raised by Johnson, other grounds exist to support the decision of the Tenth Circuit. See, *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419, 97 S.Ct. 2766, 53 L.Ed.2d 851, 862 (1977).

Central to the issue before the Tenth Circuit were the definitions of "creditor," "debt," and "claim". "Creditor" is defined at 11 U.S.C. §101(9) as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor. . . . " "Debt", as defined at 11 U.S.C. §101(11), "means liability on a claim". "Claim" is defined at 11 U.S.C. §101(4) as follows:

> (A) *Right to payment*, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) *Right to an equitable remedy for breach of performance if such breach gives rise to a right to payment*, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured. (Emphasis added.)

Johnson argues that the Bank holds a "claim" because it holds a "right to an equitable remedy for breach of performance" and that "such breach gives rise to a right to payment" as defined in 11 U.S.C. §101(4)(B).

The legislative history to 11 U.S.C. §101(4)(B) is illuminating:

> On the other hand, rights to an equitable remedy for a breach of performance with respect to which such breach *does not* give rise to a right to payment are *not* "claims" and would therefore *not* be susceptible to discharge in bankruptcy. (Emphasis added.)

124 Cong. Rec. H. 11,090 (daily ed. Sept. 28, 1978); S. 17,406 (daily ed. Oct. 6, 1978). The legislative history also indicates that the "right to an equitable remedy for a breach of performance if such breach gives rise to a right to payment" is intended to address:

> . . . rights of payment for which there may be an alternative equitable remedy with the result that the equitable remedy will be susceptible to being discharged in bankruptcy. For example, in some states, a judgment for specific performance may be satisfied by an alternative right to payment, in the event performance is refused; in that event, the creditor entitled to specific performance would have a "claim" for purposes of a proceeding under Title 11.

124 Cong. Rec. H. 11,090 (daily ed. Sept. 28, 1978); S. 17,406 (daily ed. Oct. 6, 1978). Therefore, instead of an equitable remedy being discharged, a particular creditor would have a "claim" under the Bankruptcy Code because of the creditor's alternative "right to payment". Johnson, the Bank, the District Court, and the Tenth Circuit found no authority in Kansas state law for an "alternative right to payment". Thus, the Bank, with no "right to payment," has no "claim" under 11 U.S.C. §101(4). Notwithstanding that Debtor's Chapter 13 plan is incompatible with Chapter 13 plans before other Courts, 11

U.S.C. §101(4) and its legislative history also support the affirmation of the Tenth Circuit's decision.

Finally, Johnson argues that the Tenth Circuit has expanded the language of the definition of 11 U.S.C. §101(4) to require that "right to payment" be "from the debtor". This is a perceived misstatement of the holding below. The Court below found that there was no "right to payment"; not from Johnson or anyone because of the nature of his proposed plan, Kansas state law, and the Bankruptcy Code.

The Tenth Circuit's Decision Is Not Contrary To A Decision Of This Court

Debtor asserts the Tenth Circuit decision departs from this Court's decision in *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. ___, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990), where this Court held the expansive language of the terms "debt" and "claim" permitted criminal restitution obligations to be discharged under Chapter 13 of the Bankruptcy Code. The present issue does not involve a criminal restitution order secured by an individual's personal freedom, but consists of a debtor attempting to reschedule a debt in a Chapter 13 bankruptcy after having been discharged of several hundred thousand dollars' worth of unsecured debt in his prior Chapter 7 bankruptcy. Johnson not only proposes a plan that cures no default and pays no arrearages, but also does not comply with that plan, being $109,890.00 delinquent in his payments since 1987.

The Bank recognizes the fundamental rule that statutory interpretation begins with the statute's language. *Id.* It has also been recognized that "in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Kelly v. Robinson*, 479 U.S. 36, 43, 107 S.Ct. 353, 93 L.Ed.2d 216, 225 (1986).

Johnson's position here is unreconcilable. On one hand, he suggests the legislative history of the Bankruptcy Code should not be reviewed, while, on the other hand, he cites both *Metz*, supra and *Saylors*, supra in support of his positions. As have most courts addressing this issue, both *Metz* and *Saylors* relied upon the legislative history of the Bankruptcy Code.

H. CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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